SEP 23

MICHAEL RODAK,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-327

DENNIS HART,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Claims

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To the United States Court of Claims

Petitioner, Dennis Hart, petitions for a writ of certiorari to review the decision of the United States Court of Claims entered in this case on June 28, 1974.

OPINIONS BELOW

The opinion of the Court of Claims, printed in Addendum I attached hereto, is not yet officially reported. The case was presented to the Court of Claims as an appeal from a decision of the Civil Service Commission Board of Appeals and Review (B.A.R.) entered on September 11, 1972. The B.A.R. decision,

printed in Addendum II attached hereto, is not officially reported. The B.A.R. decision affirmed a decision dated April 25, 1972, of the Chicago Region, Civil Service Commission (C.S.C.). The C.S.C. decision, printed as Addendum III attached hereto, is not officially reported. The C.S.C. decision upheld a personnel action, effective February 5, 1970, of the Internal Revenue Service of the Treasury Department (I.R.S.) removing Petitioner from his employment with the Service. The I.R.S. decision, contained in a letter dated February 2, 1970, is printed as Addendum IV attached hereto, and is not officially reported.

JURISDICTION

The order of the Court of Claims was on June 28, 1974 (Addendum I). The jurisdiction of this court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims improperly found sufficiently specific the single Charge alleging Petitioner's *conspiracy* to *solicit and accept a bribe*, and also *accepting of a bribe*, and improperly found that the evidence offered at the Civil Service Commission appeal hearing did not differ in great degree from those facts supporting the original removal, for the reason that there was no evidence whatsoever as to any facts upon which petitioner's original removal was based.

2. Whether the Board of Appeals and Review and the Court of Claims improperly concluded that only harmless error was committed as the result of the regional Civil Service Commission's adverse decision being based upon evidence (Appendix C pages 7-11) that was specifically rejected by the trial Hear-

ing Officer, which was de hors the record before the C.S.C., and which directly denied the petitioner's right of confrontation, reply, rebuttal and cross-examination of the said excluded evidence.

3. Whether the Court of Claims improperly found no error in the procedures surrounding the admission into evidence, at the Civil Service Commission hearing, of a six-volume criminal trial transcript and the subsequent reliance upon the transcript by the official reviewing the removal decision, despite the fact that there was no advance notice to petitioner that the 6 volumes would be offered in lieu of witnesses at petitioner's C.S.C. hearing, and despite the fact that petitioner was never provided a copy of the 6 volume exhibit, either before, during or after the said C.S.C. hearing. Subsidiary to this question is the fact that the 6 volume exhibit contained many hundreds of pages of irrelevant matter, and that it contained the testimony of the Government's principal witness, who was not produced as a witness and was *not* available at petitioner's hearing for confrontation and cross-examination.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Since the provisions involved are lengthy, they are merely cited here, and the pertinent texts are to be set forth in Appendix A hereto.

Constitutional Provisions:

U.S. Const. amend V

U.S. Const. amend VI

Statutes:

5 *U.S.C.* § 7511 (1966)

5 *U.S.C.* § 7512 (1966)

28 *U.S.C.* § 1255(1) (1948)

28 *U.S.C.* § 1491 (1948)

Regulations:

5 *C.F.R.* § 752.202(a)(2) (1970)

STATEMENT OF THE CASE

Petitioner is a preference eligible employee under 5 *U.S.C.* § 7511 (1966), and was employed as a Criminal Investigator with the Alcohol, Tobacco, and Firearms Division of the Internal Revenue Service (I.R.S.). By a notice of proposed adverse action, dated December 30, 1969, and printed as Addendum VI hereto, Petitioner was informed by I.R.S. Assistant Regional commissioner, W. A. Collawn, that it was proposed to remove

Petitioner from the Service or otherwise discipline him, based on the charge and specification that on or about December 26, 1969, at Goldsboro, N.C., he conspired to solicit and accept a bribe, *and did accept a bribe*.

By a letter dated January 7, 1970, printed as Addendum V hereto Petitioner was informed that the charge was sustained and that he was *suspended* from duty and pay for a period of thirty (30) days, until February 5, 1970. Petitioner requested reconsideration in a telegram dated January 20, 1970.

By letter dated February 2, 1970, printed as Addendum IV hereto Mr. W. A. Collawn informed Petitioner that the charge was sustained and he was *removed* from the Service effective February 5, 1970. By letter dated February 18, 1970, printed as Addendum V hereto Petitioner was informed that the *suspension* decision was affirmed.

By letter dated March 4, 1970, printed as Appendix B hereto Petitioner appealed the removal action to the C.S.C. A hearing on this appeal was requested and scheduled, but the date of the hearing was postponed several times at the request of the Government. The hearing was held in St. Louis, Missouri, on January 17, 1972, before hearing officer Kirby Smith, Jr. The transcript (Hearing Record) of this hearing is printed at Appendix C., p. 6. At the hearing, testimony was received from Petitioner, I.R.S. agent Virgil Kruse, and Bureau of Narcotics and Dangerous Drugs (B.N.D.D.) Inspector John Thompson. Exhibits offered and accepted on behalf of Petitioner were: (i) a copy of the results of a polygraph test given to Leslie Atkinson, the man from whom Petitioner allegedly conspired to solicit and accept the bribe; (ii) an evidentiary order from a federal court in the Eastern District of New York; and (iii) a Justice Department Motion for dismissal of criminal charges pending against Petitioner. These exhibits are printed as Appendices D, E, and F, hereto.

The evidence offered by the I.R.S. at the hearing was: (1) a six-page report co-authored by Inspector Thompson (excluded upon objection), printed in Addendum III hereto; (A-28 to A-31) and (2) a report by alleged B.N.D.D. Inspector Yates (admitted over objection), printed in Addendum III hereto A-31 to A-35. (3) There was also an offer of a six-volume transcript of a New York criminal trial which was never designated a Hearing Exhibit, which was "conditionally" received by the hearing officer. This criminal trial transcript is *not* presented as Petitioner's exhibit for the reason that Petitioner has never been furnished a copy thereof by the Government.

In a decision by J. A. Connors, Chicago Region, C.S.C., dated April 25, 1972 (Addendum III), the removal decision was sustained. An appeal was taken to the B.A.R. There, in a decision dated September 11, 1972 (Addendum II), the decision was affirmed.

Petitioner filed his petition in the United States Court of Claims on February 28, 1973, asserting federal jurisdiction under 28 *U.S.C.* § 1491 (1948). Upon the briefs and oral argument of counsel, the Court of Claims on June 28, 1974, entered its order denying Petitioner's motion for summary judgment and granting defendant's cross motion for summary judgment Addendum I attached hereto.

REASONS FOR GRANTING THE WRIT

Petitioner contends that the entire administrative procedure by which he was removed, beginning with the initial instigation of the charge and continuing through the C.S.C. hearing and decision and the B.A.R. decision, has so far departed from the accepted and usual course of proper administrative proceedings as to call for an exercise of this court's power of supervision. On its face, the record below shows that the proceedings were not in substantial compliance with constitutional, statutory and regulatory requirements; that the removal of Petitioner by the agency was arbitrary and capricious action; and the removal decision is not supported by substantial evidence. The action of the Court of Claims has so far sanctioned this departure from the accepted and usual course of administrative proceedings as to call for an exercise of this court's power of supervision.

One or two, or even several minor technical evidentiary deficiencies might not, standing alone, amount to a denial of due process; but that is not what is involved in this case. Here there is a record of heavy-handed practices administered with cavalier disregard for even the semblance of accepted standards of fair play or legality. The totality of this record discloses a callousness on the part of the agency officialdom as applied to Petitioner. This record in its entirety is so replete with shocking irregularities and is so permeated with the lack of even any pretense at fundamental fairness as urgently to require review of this court.

From the time of the original confusion concerning the suspension and removal, this record shows a deplorable insensitivity to even the most rudimentary standards of justice, and it is perhaps a sad commentary on the administrative appellate process that Petitioner has been forced to petition this Court for redress of the denial of his procedural protections.

The following particulars clearly show that action by this court is required to prevent deprivation of Petitioner's rights:

1. Petitioner is charged with 1) having *conspired* on 12-26-69 with Richard Patch at Goldsboro, N. C. to accept a bribe; and 2) *accepting* a bribe from Leslie Atkinson.

There is no evidence whatsoever of when, at what specific place, nor of what specific acts were "conspired" to accomplish; nor is there any evidence of any specific *overt act* perpetrated in furtherance of an alleged conspiracy. The charge in this respect is so vague and general as to be impossible of rebuttal, reply denial or mitigation.

There is no evidence or fact alleged which could be held to constitute *acceptance* of a bribe by petitioner or his alleged co-conspirator. The charge of *acceptance of a bribe*, being supported by no alleged acts, is so vague and general as to be impossible of rebuttal, reply to denial or mitigate. This lack of specificity also constitutes a denial of Petitioner's rights under 5 *U.S.C.* § 7512 (1966), to a statement of "any and all reasons, specifically and in detail, for the proposed [adverse] action." Petitioner was also denied his right under 5 *C.F.R.* § 752.202(a)(2) (1970), to review the material upon which the notice of proposed adverse action was based.

Additionally, some evidence produced at the C.S.C. appeal hearing and relied upon in the C.S.C. decision, necessarily differed from the evidence, if any, upon which his original removal was based. This is true because the hearing officer at the C.S.C. appeal hearing allowed the admission of evidence, i.e. 6 volume transcript which related to a criminal trial which had occurred prior to the hearing but *subsequent* to the removal decision. The allegations contained in the criminal indictment were not identical to the charge in the notice of proposed adverse action, so Petitioner's opportunity to defend was impaired.

Because Petitioner's removal was founded on a charge which lacked specificity and because it was "based on reasons not contained in the charge originally served on him, but on reasons he never had a chance of rebutting," this case comes within the scope of the principle enunciated in *Urbina v. United States*, 180 Ct. Cl. 194 (1967), and the removal should be held defective.

2. At the C.S.C. appeal hearing, the Government attempted to introduce an exhibit—a six-page report co-authored by Inspector Thompson (Addendum III pp. A-23 to A-31)—but was prevented from doing so by the hearing officer's ruling which excluded the evidence. App. C, *infra*. The written C.S.C. decision (Addendum III, pp. A-23 to A-31) nevertheless *quotes the excluded exhibit verbatim*, thus showing that the excluded exhibit was relied upon in making the decision on the appeal. The subsequent B.A.R. decision stated that this was only "harmless error" for the *reason* that Mr. Thompson's testimony at the C.S.C. hearing *substantially recounted* the statements contained in the excluded exhibit (Addendum II, pp. A-5 to A-7). The Court of Claims agreed that only harmless error was involved (Addendum I, pp. A-2, A-3).

However, even a cursory examination of Thompson's testimony at the C.S.C. hearing of 1-17-70 and a comparison of this testimony with the flagrantly improper, hearsay 6-page "statement" ruled improper and excluded at the trial of petitioners C.S.C. hearing, clearly shows this *reason* for declaring the error to be "harmless" to be wrong and utterly groundless.

The actual testimony of Inspector Thompson at the January 17, 1972 C.S.C. hearing dealt *solely* with non-incriminating occurrences *on and after the date of petitioner's arrest* at Goldsboro, N. C. on December 26, 1969. This testimony is to be found at pp. 11 through 31 of the transcript of petitioner's C.S.C. hearing. (Appendix C)

The 6-page statement, which was properly excluded at the Jan. 17, 1972 C.S.C. hearing by the presiding hearing officer, dealt with and recounted hearsay of the most virulent and unattributed sort dealing *solely* with occurrences alleged to have taken place *prior to petitioner's arrest* at Goldsboro, N. C. on December 26, 1969.

It is absolutely inconceivable that the B.A.R., as attorneys, would adopt a position that the 6-page excluded statement dealing with two years of alleged improper conduct *prior* to arrest, was "substantially recounted" in Inspector Thompson's testimony dealt solely with the arrest and matters occurring thereafter. It is both inconceivable and frightening that the United States Court of Claims has adopted and condoned such a ruthless infringement and denial of the rights of this petitioner, and of future civil service petitioners so abused.

The very basic impropriety which the Court of Claims and the B.A.R. overlooked, or chose to ignore, is petitioner's absolute *right* to reply to and rebut evidence offered and *admitted* against him at his C.S.C. hearing. The thoroughly and patently inadmissible 6-page statement was objected to at the hearing and was *not admitted*, it was twice specifically *excluded*. Hence, petitioner was not confronted with it, and as a result had no occasion or opportunity to reply or rebut it's scurrilous content. At the time that the authors of the C.S.C. decision in Chicago saw fit to adopt and include verbatim this *excluded* evidence in their decision ( ) petitioner could not reply or rebut for the obvious reason that the star-chamber adoption of the excluded evidence was not made known to him until the affirmance of the removal decision.

3. At the C.S.C. hearing, the Government attempted to introduce into evidence a six-volume transcript, containing more than one-thousand pages, of a criminal trial relating to the Petitioner. Upon objection, the hearing officer conditionally re-

ceived the material, subject to a subsequent ruling on its relevancy and materiality. App. C, *infra*, p. 6. Such a subsequent ruling was *never* made, with the result that the transcript was never officially received as evidence, and its contents should not have been considered.

The action of the Hearing Officer in receiving the 6 volume, 1000 page, transcript of testimony from a previously mistried criminal case ". . . subject to a subsequent ruling concerning its relevancy and materiality in the appraisal of this particular administrative action" (App. C, p. 6) is error so flagrant and original that petitioner cannot find precedent condemning it. The "subsequent ruling" was *not made at petitioner's January 17, 1972 hearing* so obviously the petitioner was not afforded confrontation with *admitted* evidence. He had no opportunity to reply, rebut, mitigate or specifically make objection to specific parts of this "evidence" made known to him for the first time on the morning of his C.S.C. hearing of Jan. 17, 1972.

If this 6-volume mass of "evidence" was in fact admissible for any purpose, which petitioner earnestly contests, it was admissible at the time of the January 17, 1972, Hearing. *Had* the Hearing Officer, rightfully or wrongfully, made a ruling at that time of admissibility, at least petitioner would have had an opportunity to *read* the 6 volumes and to make reply, rebuttal and specific objection to the testimony therein.

The Civil Service Commission appellate machinery came up with a frighteningly simple and unique method of depriving petitioner of his basic right to confront, reply, rebut or make specific objection to the awesome array of witness testimony, exhibits, stipulations and prejudicial, irrelevant and immaterial content of 6 volumes of testimony. The St. Louis official, acting as Hearing Officer, fails or refuses to rule as to admissibility at time of trial, the Chicago official, acting as decision-maker, allows the full 6 volumes into evidence without any further

notice to petitioner, except his final decision that petitioner is fired from his career position on the basis of this 6 volumes that was never shown to him.

If the transcript is to be considered as evidence, it is apparent that the Petitioner was denied his Sixth Amendment right of confrontation and cross-examination of those witnesses at the criminal trial whose testimony is purported to be adverse to Petitioner. Any such purported testimony relates to the issues raised by the criminal indictments, subsequently dismissed on Justice Department motion, and covers different areas than those related to the single agency charge.

Petitioner's rights have been abused in a particularly violent manner in relation to the chief Government witness against Petitioner at the criminal trial, Mr. Leslie Atkinson. At the time Atkinson testified and was cross-examined and confronted at the criminal trial nine months prior to the C.S.C. adverse decision the Government knew, but did not disclose to the Court or to defense counsel, that Atkinson had failed a Government administered polygraph (lie-detector) test in relation to portions of his testimony adverse to Petitioner. App. D. Once this fact was revealed, the criminal charges against Petitioner were dropped. App F.

The failure of the Government to provide Petitioner with a copy of the transcript also violated his right under 5 *C.F.R.* § 752.202(a)(1), 752.202(a)(2) to review the material relied on to support the removal. The Court of Claims failed to comment or rule on the question of the retrospective application of 5 *C.F.R.* § 752.202(a)(1) and 752.202(a)(2), although the applicability of these sections was briefed and argued by plaintiff and defendant in that Court. Similarly, the failure of the C.S.C. to advise Petitioner of the evidence it intended to use against him, and particularly the failure to furnish him with a copy thereof has been condemned in *Kutcher v. Higley*, 235 F.2d

505 (D.C. Cir. 1956), and *Mulligan v. Andrews*, 211 F.2d 28 (D.C. Cir. 1954.

If the transcript was not properly admitted into evidence, it should not have been considered in the C.S.C. decision and reliance on it constitutes reversible error. Similarly, if it was admitted into evidence, the procedural method by which it was unqualifiedly received also constitutes reversible error since it was relied upon in the C.S.C. decision. The U. S. Court of Claims condemned, in the case of *Ricucci v. U. S.*, 192 Ct. Cl. 1, an attempted use of documentary "evidence" very similar to that encountered herein, reversing, and calling the procedure "error of the greatest magnitude."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

WILLIAM B. KELLEHER
Attorney for Petitioner

September, 1974.

Certificate of Service

I hereby certify that on the 20th day of September, 1974, three copies of the Petition for Writ of Certiorari were mailed to the Solicitor General, Department of Justice, Washington, D. C. 20530.

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Attorney for Petitioner

ADDENDUM I

In the United States Court of Claims

No. 73-73

Dennis Hart

v.

The United States

Before Davis, *Judge*, Presiding; Laramore, *Senior Judge*, and Kashiwa, *Judge*.

ORDER

This case comes before the court on plaintiff's motion, filed September 12, 1973, for summary judgment and on defendant's cross motion, filed December 6, 1973, for summary judgment. The case has been submitted on the briefs and oral argument of counsel.

Plaintiff contends, in this proceeding, that the Internal Revenue Service's removal action instituted against him was procedurally defective and the proceedings before the Civil Service Commission denied him procedural due process. We find that the procedures were proper and, also, upon a review of the record, that the decision was neither arbitrary nor capricious and is supported by the substantial evidence.

Plaintiff claims that the delay of the hearing pending the criminal charges against plaintiff denied him procedural due

process under the Fifth and Fourteenth Amendments. In *Cohen v. United States*, 177 Ct. Cl. 599, 369 F. 2d 976 (1966), *cert. denied* 387 U. S. 917 (1967), this court held that a plaintiff is required to show "demonstrable prejudice" to support a charge of procedural error. We see no such prejudice in this case. The delay was due to a pending criminal case. In fact, any financial prejudice involved could be remedied, if a claim could be made out, by administrative action or under the Back Pay Act, 5 U.S.C. § 5596 (1970). See, also, *Polcover v. Secretary of Treasury*, 477 F. 2d 1223 (D.C. Cir. 1973).

Plaintiff also argues that certain evidence was improperly considered at the regional level of the Civil Service Commission. However, the decision of the Civil Service Commission Board of Appeals and Review correct any possible irregularity. With respect to an exhibit, the plaintiff alleges that it was rejected by the Civil Service Commission hearing officer but nonetheless relied upon. The Board of Appeals and Review, however, noted that there was testimony under oath, at the hearing, substantially recounting the facts of the exhibit. The Board of Appeals and Review, therefore, concluded that only harmless error was involved. We agree.

In addition, plaintiff claims that six volumes of criminal transcript were improperly received in evidence by the hearing officer. We see no error in such admission. The rules of evidence are not to be strictly applied in such a proceeding. 5 C.F.R. § 772.305(c)(4). The use of the transcript was proper. We do not see how "surprise" can be claimed. The plaintiff knew of the existence of such a transcript and of its use as potential evidence. It should also be pointed out that at the criminal trial plaintiff had ample opportunity to confront and cross-examine the witnesses. Such evidence has consistently held to be admissible in Civil Service Commission proceedings. *Kowal v. United States*, 188 Ct. Cl. 631, 412 F. 2d 867 (1969); *Cohen v. United States, supra; Prater v. United States*, 172 Ct.

Cl. 608 (1965). As to whether or not the decision was based on Atkinson's testimony at the criminal trial, we can only say that the Board of Appeals and Review decision is based on substantial evidence of plaintiff's conduct aside from Atkinson's testimony.

Plaintiff's other arguments regarding procedural defects lack merit. We see no error in the Internal Revenue Service's suspension and removal. The charge was certainly specific and the facts in the charge do not differ in any great degree from those supporting removal.

It Is Therefore Ordered that plaintiff's said motion for summary judgment, filed September 12, 1973, be and the same is denied, defendant's cross motion for summary judgment, filed December 6, 1973, be and the same is allowed; and plaintiff's petition is hereby dismissed.

By the Court

/s/ OSCAR H. DAVIS
Judge, Presiding

June 28, 1974

ADDENDUM II

United States Civil Service Commission
Board of Appeals and Review
Washington, D. C. 20415

DECISION

In the Matter of
Dennis J. Hart

Type Case:
Removal

Introduction

Mr. Hart has appealed, through his attorney, Mr. William B. Kelleher, from a decision of the Commission's Chicago Regional Office issued on April 25, 1972. In its decision the Regional Office upheld the action of the Department of the Treasury, Internal Revenue Service by which Mr. Hart was removed from his position as a Criminal Investigator, GS-1811-11, $11,233 per annum, effective February 5, 1970.

Statement of the Case

The appellant was notified by letter dated December 30, 1969 that it was proposed to remove him from the service based on the following charge and specification:

> "Charge 1: Conspiring to solicit and accept a bribe. Specification 1: On or about December 26, 1969, at Goldsboro, N. C., you conspired to solicit and accept a bribe, as a government employee, from Leslie Atkinson to aid him in a pending narcotics case in the

> Eastern District of New York. You conspired with Richard M. Patch, a former government employee, in the solicitation and acceptance of the bribe."

The notice also informed the appellant that in view of the nature of the charge and specification it was considered detrimental to the interests of the government to retain him in a duty status. Therefore, it was proposed to suspend him from duty for a period not to exceed 30 days pending a final decision on the proposed removal action.

The appellant replied to neither the proposed suspension nor the proposed removal and by letter dated January 7, 1970 the agency issued a decision to effect the proposed 30-day suspension, and by letter dated February 2, 1970 the agency issued a decision to effect the appellant's removal from the service, effective February 5, 1970.

By telegram dated January 21, 1970 the appellant requested reconsideration of the suspension action. The agency issued a decision dated February 18, 1970 sustaining the suspension.

First Level Decision

The appellant's appeal and request to the Commission's Chicago Regional Office for a hearing were held in abeyance, at the request of the agency, pending the outcome of a criminal proceeding against Mr. Hart in the U.S. District Court in Brooklyn, New York.

A hearing was held before a Commission representative on January 17, 1972.

The Regional Office found that the agency had complied with all of the mandatory procedural requirements of the Civil Service Regulations in effecting both the 30-day suspension and the removal action.

With respect to the merits of the case the Regional Office found that the preponderance of the credible evidence supported the charge and specification against the appellant. The Region further found that the agency's action in removing the appellant from the service was not unreasonable, arbitrary or capricious but was warranted and was taken for such cause as would promote the efficiency of the service.

Representations to the Board of Appeals and Review

The appellant, through his attorney, submitted representations which were received by the Board on May 16, 1972. The agency submitted representations, in rebuttal, under date of June 16, 1972. The representations submitted by and in behalf of both parties have been fully considered by the Board in the adjudication of this appeal.

Analysis and Findings

Before considering the procedural and substantive aspects of this case the Board must decide what materials constitute the appellate record, in light of the appellant's objection to the introduction into evidence of the entire six volume transcript of a criminal proceeding before the U. S. District Court for the Eastern Region of New York.

The appellant contends that the trial transcript contains evidence and testimony which were not available to the agency when it took action to remove him from the service and that said evidence and testimony should not be considered in the appellate process. Appellant further contends that even if there is relevant material in the trial transcript that material should have been extracted and introduced into evidence separately.

Section 14 of the Veterans Preference Act provides that upon an employee's appeal to the Commission, the Commission is to

investigate and consider evidence. The Regulations governing the conduct of appeals before the Commission provide, for example, for the taking of testimonial and documentary evidence and the cross-examination of witnesses.

In the instant case the trial transcript contains evidence and testimony which is relevant to the charge and specification upon which the appellant's removal from the service was based. The Board, therefore, finds that such information was properly admitted into evidence and is to be considered as part of the appellate record.

Appellant further challenges the consideration, by the Commission's Regional Office, of two reports. The first by Inspectors Walter T. Yates and John E. Thompson entitled "Report of Arrest of Dennis J. Hart and Richard M. Patch on charges of Acceptance and Soliciting a Bribe"; and the second by Inspector Walter T. Yates and Special Agent James Madden entitled "Report of Interview of Dennis J. Hart and Richard M. Patch."

The appellant alleges that the first report was not accepted into evidence at the Commission hearing but was nevertheless considered by the Chicago Region in rendering its decision. The Board, however, notes that the testimony of Inspector Thompson, under oath at the Commission hearing, substantially recounts the pertinent facts in the written report. The Board, therefore, concludes that the consideration of said report constituted harmless error.

With respect to the second report the appellant alleges that it should not have been admitted into evidence since it was not signed by the purported author. The Board notes, however, that Inspector Thompson, who was closely involved in the arrest and interrogation proceedings during the period involved, verified, under oath at the Commission hearing, that the second report was co-authored by Inspector Yates. The Board, there-

fore, finds that said report was properly admitted into the record.

Having determined that the record before the Board is complete and having thoroughly reviewed said appellate record, the Board concurs in the finding of the Chicago Regional Office that the agency complied with all of the mandatory procedural requirements of Part 752 Subpart B of the Civil Service Regulations in effecting the appellant's removal from the service.

With respect to the 30-day suspension the Board agrees with the Regional Office that the procedural requirements of the Civil Service Regulations were complied with by the agency in effecting said suspension and that emergency conditions warranted said suspension.

Appellant raised objections, in his appeal to the Board, concerning what he contends are "inexcusable delays" on the part of the Commission and the agency in granting a hearing on his proposed removal.

The Board notes that the delay in holding a hearing was due to a request by the U. S. Attorney's Office, Brooklyn, New York, to delay the proceeding before the Commission until criminal proceedings against the appellant could be completed in the U. S. District Court. Such delays at the request of the agency or the appellant are granted by the Commission as a matter of practice. In the absence of any demonstrable prejudice to appellant's case resulting from such a delay the Board finds no reversible procedural error in granting the delay in this case.

The appellant further alleges procedural error in that witnesses he requested were not present at the hearing. The witnesses referred to were a material witness against him at his criminal trial, Mr. Leslie Atkinson and seven agents of the Bureau of Narcotics and Dangerous Drugs, Department of Justice.

The Commission is not authorized to subpoena witnesses. The employee and the employing agency must make their own arrangements for the appearance of witnesses.

In the present case none of the witnesses requested are employed by the Internal Revenue Service, and one of the requested witnesses is not a government employee at all. The request for these witnesses was made by the appellant's representative to the Civil Service Commission, which has no power to subpoena them. The Board notes, however, that one employee of the Bureau of Narcotics and Dangerous Drugs, Inspector John E. Thompson who was the officer in charge of the arrest of the appellant, was present at the Commission's hearing. The Board further notes that even though Leslie Atkinson was unavailable at the hearing the record of his testimony and cross-examination are a part of the appellate record which was available to the appellant. The Board, therefore, finds no procedural error in the absence of the witnesses requested by the appellant.

Appellant further objects to the procedure by which the Chicago Regional Office sent his case to St. Louis for a hearing and the subsequent rendering of a decision by the Chicago Regional Director who did not conduct the hearing.

The Board notes that the case was sent to the St. Louis Region for the convenience of the appellant. The Board further notes that Civil Service Regulations do not require that the hearing officer render the decision in an appeal. The Board finds no irregularity in the procedure which sent the appellant's case to St. Louis for a hearing and by which the Chicago Office rendered the decision.

With respect to appellant's objection to the introduction into evidence, at the Commission Hearing, of a current indictment for perjury, the Board finds that such evidence is irrelevant to the current charge and should not have been allowed. However,

the Board finds nothing in the record to indicate that the admission of said evidence was in anyway prejudicial to the appellant. The Board therefore finds that the admission of testimony regarding the current indictment against the appellant did not constitute reversible error.

With respect to the substantive considerations in this case the Board finds, as did the Chicago Regional Office, that the substantial evidence of record supports the charge and specification against the appellant.

The evidence of record indicates that the appellant and Richard M. Patch did conspire to extract something of value from Leslie Atkinson. The contentions of the appellant that he was attempting to obtain information from Atkinson regarding firearms is plainly not supported, in any respect, by the evidence of record.

The record clearly indicates that the appellant was not acting in an official capacity when he contacted Leslie Atkinson and arranged to meet with him. The numerous phone calls from appellant to Atkinson and the subsequent meeting between the two, in Goldsboro, North Carolina, coupled with the agency's complete lack of knowledge of the appellant's actions provide adequate proof that the appellant was acting on his own and not in any official capacity.

The evidence of record provides ample proof that the appellant and Richard Patch conspired over a period of time to solicit a bribe from Leslie Atkinson. The trial transcript is replete with the testimony of various witnesses which place the appellant, Patch and Atkinson together on numerous occasions with no hint of official purpose on the part of the appellant.

The Board, therefore, agrees with the Chicago Region's finding that the agency's action in removing the appellant from the

service was not arbitrary, capricious, or unreasonable, but that it was warranted and was taken for such cause as will promote the efficiency of the service.

Decision

The decision of the Commission's Chicago Regional Office is hereby affirmed.

Section 772.307(c) of the Civil Service Regulations provide that decisions of the Board of Appeals and Review are final and there is no further right of administrative appeal.

For the Commissioners:

/s/ WILLIAM P. BERZAK
Chairman

September 11, 1972

ADDENDUM III

United States Civil Service Commission
Chicago Region
Office of the Director, Chicago, Ill. 60607

April 25, 1972

William Kelleher
Attorney at Law
604 Title Guarantee Building
706 Chestnut Street
St. Louis, Missouri 63101

There is transmitted herewith a copy of the decision in the appeal described below:

Appeal of: Dennis J. Hart

Action appealed: Removal

Employing agency: IRS, Treasury Department

Decision: Agency Sustained

You have further appeal rights as indicated on the last page of the decision.

Sincerely yours

/s/ J. A. CONNOR
Regional Director

Enclosure

cc: Dennis J. Hart
IRS, Washington, D.C.

APPEAL OF MR. DENNIS J. HART UNDER SUBPART B OF PART 752 OF THE CIVIL SERVICE REGULATIONS

April 25, 1972

Introduction

By letter dated March 4, 1970, Mr. Hart appealed from the action of the Treasury Department, Internal Revenue Service, in removing him from the Service. The action was effected on February 5, 1970. Prior to that time Mr. Hart was employed as a Criminal Investigator, grade level GS-1811-11, step 1, $11,-233.00 per annum, in the Midwest Region, Chicago Branch Office—Enforcement, at Springfield—Sangamon—Illinois.

Mr. Hart is a non-veteran entitled to appeal rights under Part 752 of the Civil Service Regulations. He has served a probationary period in the Federal Service. Removal is an appealable action within the purview of these regulations.

The letter of appeal was executed by appellant's representative, William B. Kelleher, Attorney-at-Law, who requested a hearing before the Commission on the appellant's behalf. By letter dated March 13, 1970, Mr. Kelleher informed the Commission that circumstances over and beyond his control, hospitalization necessitated because of a stroke and for brain surgery, was responsible for the filing of an untimely appeal. Based on these representations, the Commission elected to accept the appeal as timely filed.

Mr. Hart's requested hearing was held on January 17, 1972. It had been held in abeyance, at the agency's request, pending the outcome of prosecution proceedings against the appellant in the U. S. District Court in Brooklyn, New York. A verbatim transcript of the hearing was prepared and is furnished herewith.

Analysis and Findings

In a letter, dated December 30, 1969, over the signature of W. A. Collawn, Assistant Regional Commissioner (Alcohol, Tobacco & Firearms), the appellant was notified of proposed adverse action, in order to promote the efficiency of the Service, to remove him from the Service or otherwise discipline him based on the following charge:

"*Charge 1*: Conspiring to solicit and accept a bribe.

> *Specification 1*: On or about December 26, 1969, at Goldsboro, N. C., you conspired to solicit and accept a bribe, as a government employee, from Leslie Atkinson to aid him in a pending narcotics case in the Eastern District of New York. You conspired with Richard M. Patch, a former government employee, in the solicitation and acceptance of the bribe."

Mr. Collawn's proposal notice to the appellant continued as follows:

"In view of the nature of the charge and specification, your continued presence on the job is considered detrimental to the interests of the government; based on the charge and specification, it is proposed to suspend you from pay and duty status for not more than thirty days prior to final decision on the above proposed adverse action . . ."

It is found that the reasons for the proposed removal and suspension actions were stated with sufficient specificity and detail to permit the opportunity for reply and refutation. Mr. Hart was given fifteen (15) calendar days from receipt of the proposal letter in which to answer the above charge both personally and in writing and to furnish affidavits and evidence in support of his answer. He was allowed until 12:00 noon, Tues-

day, January 6, 1970 to reply in writing to the proposed suspension and to submit affidavits in support of his reply.

Mr. Hart did not submit a written reply to the proposed suspension.

By letter dated January 7, 1970, the appellant was notified by Mr. C. J. Schulz, Acting Assistant Regional Commissioner, that he (appellant) did not submit a written reply by 12:00 noon, Tuesday, January 6, 1970; that it was his decision that the charge was sustained; that appellant's continued presence on the job would be detrimental to the interest of the government; and that it was his decision that appellant be suspended from duty and pay for a period of 30 days commencing January 7, 1970, and extending through February 5, 1970. The appellant's appeal rights were then set forth to the Regional Commissioner and to the Civil Service Commission.

Mr. Hart did not submit a reply to the proposed removal.

By letter dated February 2, 1970, the appellant was notified by Mr. W. A. Collawn that he did not answer the charge either personally or in writing; that after careful consideration of the charge as stated in his letter of December 30, 1969, it was his decision that Charge I and Specification I are sustained; that the proposed action was warranted and it was his decision to remove appellant from the Internal Revenue Service. Appellant's appeal rights within the Internal Revenue Service and the Civil Service Commission were set forth in the decision letter. Accordingly, it is found that the Internal Revenue Service met all the mandatory procedural requirements of Subpart B of Part 752 of the Civil Service Regulations, in effect at the time, in the processing of the removal action.

By telegram dated January 21, 1970, and received in the regional office on the same day, Mr. Hart requested reconsideration of the suspension action. In a letter dated February 18,

1970, over the signature of A. J. Schaffer, Director, Personnel Division, the appellant was informed that he (Schaffer) had given careful consideration to the evidence in appellant's case including his telegram dated January 21, 1970; that appellant's explanation did not satisfactorily refute the charge and specification made against him; that he found the charge and specification were supported by substantial evidence, warranted appellant's suspension from duty; that the decision by Acting Assistant Regional Commissioner Schulz was affirmed; that this decision terminated appellant's agency appeal rights and that he had no further right of appeal within the Treasury Department. Mr. Hart next elected to appeal directly to the Civil Service Commission.

Mr. Hart was suspended from duty and pay from January 7, 1970 through February 5, 1970, the effective date of his removal. Suspensions of 30 days or less require the following procedural requirements as set forth in Subpart C of Part 752 of the Civil Service Regulations. Section 752.302 (a) of the regulations provides that the employee whose suspension is sought is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action; (b) that the employee is entitled to a reasonable time for filing a written answer to the notice of proposed suspension and for furnishing affidavits in support of his answer, and, if the employee answers, the agency shall consider the answer in reaching its decision; (c) that the employee is entitled to notice of the agency's decision at the earliest practicable date, that the agency shall deliver the notice of decision to the employee at or before the time the action will be made effective, that the notice shall be in writing, inform the employee of the reasons for the suspension, inform the employee of his right to appeal to the appropriate office of the Commission, and inform him of the time limit within which the appeal may be submitted.

Emergency procedures are set forth in Section 752.303 in an emergency case when circumstances are such that the reten-

tion of an employee in an active duty status in his position may result in damage to government property or may be detrimental to the interests of the government or injurious to the employee, his fellow workers or the general public, the agency may require the employee to answer the charges and submit affidavits within such time as under the circumstances would be reasonable, but not less than 24 hours, and when these circumstances require immediate action, the agency may place the employee in a nonduty status with pay for such time, not to exceed five days, as is necessary to effect the suspension.

Section 752.304 provides for appeal rights to the Commission and the scope of the Commission's review on appeal is to review the procedures used in a suspension under this subpart. Subparagraph 4 provides that when a suspension was imposed during the advance notice period of some adverse action covered by Subpart B of this part, the Commission reviews the reasons for not retaining the employee in an active duty status if the employee appeals from the final adverse action.

It is found that the procedures followed by the agency in effecting Mr. Hart's suspension were in agreement with the above applicable regulations. It is further found that the circumstances of the charge were of a sufficiently emergent nature to lead the agency to reasonably believe that retention of the appellant in an active duty status in his position would be detrimental to the interests of the government. Therefore, it is found from a review of the procedures followed in effecting the suspension action that the suspension action was proper from a procedural standpoint.

Among the documents submitted for the record at the Commission hearing were certified copies of six volumes of the eight volume transcript of the proceedings in the United States District Court, Eastern District of New York, United States Courthouse, Brooklyn, New York, on November 2, 4, 5, 6, 9 and 10, 1970, of the trial in 70 CR 107, a criminal action, entitled:

United States of America—against—Dennis Hart and Richard Patch, Defendants. In Count Four of the Criminal Action Indictment which resulted in this trial, the Grand Jury charged, among other allegations, that on or about the 26th day of December 1969, the defendant, Dennis Hart, being an employee of the United States, and the defendant, Richard Patch, willfully and knowingly conspired to accept and receive sums of money from Leslie Atkinson for themselves in return for being influenced to commit fraud on the United States.

This is essentially the same charge that was alleged against the appellant in the proposal letter of December 30, 1969. The evidence produced at the criminal trial relating to the said charge therefore had a direct bearing on the issues involved and was allowed into evidence as part of the record at the Commission hearing.

Of the four exhibits submitted by the appellant's representative (A, B, C and D) three, B, C and D, pertain to orders entered in the New York case that culminated in dismissal of the indictment as to both defendants on December 6, 1971, on a Motion to Dismiss made by the United States Attorney based on the government's conclusion that there was no realistic possibility that proof would now support a verdict of guilty beyond a reasonable doubt of the specific allegations, dates and events charged in the indictment as would be required for conviction in a criminal case. The fourth exhibit (A) was a special report of the results of a polygraph examination submitted to Leslie Atkinson on January 7, 1970, as a result of which it was concluded in the opinion of the examiner that Mr. Atkinson was not truthful in his answers to certain listed questions.

This was the same Mr. Leslie Atkinson of Goldsboro, North Carolina, who testified on behalf of the government in the criminal proceedings against Messrs. Hart and Patch. He testified that he was arrested in March 1969 for a narcotics offense; that Dennis Hart, in his official capacity of Agent for the Bureau

of Narcotics, interviewed him in the Wilson County Jail at Wilson, North Carolina, after the arrest, and asked him about providing information for the Bureau of Narcotics, to which he agreed; that he never gave Hart any worth-while information; that he pleaded not guilty to the offense on August 21, 1969, in a New York courthouse; that the following day, August 22nd, he had a conversation with Hart in which Hart asked him how he would like to walk free in his case and concluded the conversation with, "Okay, get up $50,000 and we can do business." Mr. Atkinson testified to subsequent telephone conversations and meetings instigated primarily by Mr. Hart; that Mr. Patch was present at two of these meetings on or about October 8th and November 3rd at the Drop-In Inn that during these several conversations and meetings, Mr. Hart either inquired about or asked him for the money; that on the evening of November 6, 1969, he had the money ($20,000) in his automobile and while he talked with Mr. Hart about fifteen feet from the vehicle, Mr. Patch removed the money from the automobile and the meeting terminated with Mr. Patch telling him, "Get the rest of it as fast as you can."

Mr. Atkinson next testified to appearing in court on November 10th and pleading guilty to a tax count; that about a week later he started receiving telephone calls from Mr. Hart in which he (Hart) would say, "The people are waiting for the money;" that Mr. Hart wanted him (Atkinson) to meet him at Lambert Field, St. Louis, Missouri, with the rest of the money; that he never went to any of the meetings he agreed to attend with appellant; that Mr. Hart telephoned him several times in December 1969; and that with one Ellis Sutton and his partner, Herman Jackson, he recorded some of these phone conversations.

More particularly, Mr. Atkinson testified to telephone conversations that he received from Mr. Hart on December 19th and 26th, 1969, which he recorded. He stated further that the transcripts of record, which appear as Government Exhibits

Nos. 2 and 3, accurately reflect the conversations; and that the word "information" used during the conversations meant money, per former instructions from Mr. Hart.

Mr. Atkinson contacted Inspector Thompson immediately after the December 26th phone conversation was concluded. He testified next to meeting Hart and riding around with him to locate his brother for the money; that Mr. Patch was with Mr. Hart at the time; that Inspector Thompson had given him a packet of money with instructions to place the money on the floorboard of his car for Hart to take and when Inspector Thompson did not appear at the pre-arranged time and place, he (Atkinson) did not follow through with the arranged plan.

The telephone conversations recorded by Mr. Atkinson appear of record as CSC Exhibit No. 1 and Government Exhibits Nos. 2 and 3.

As reflected in the transcribed recorded telephone conversation of December 17, 1969 (CSC Exhibit No. 1), this conversation started with an inquiry by Hart as to what the hell was wrong and why Atkinson did not appear for an appointment on Monday night to give him certain information. Mr. Atkinson referred to working with appellant's people and co-workers as reason for not keeping the appointment and inquired if one of them was with the information. The general conversation centered about "information." It was otherwise carried on in nebulous and non-descriptive terms. Appellant told Atkinson to "get here in six hours . . . can get here in eight hours" and became abusive when Atkinson appeared reluctant and threatened him with a jail sentence. It terminated with Atkinson agreeing to be there at 8:00 o'clock, but the "there" was not identified.

The transcribed recorded telephone conversation of December 19, 1969 (Government Exhibit No. 2), commenced with Atkinson excusing himself because he was sick and explaining that he got the information. Mr. Hart then arranged with him for an-

other appointment on Tuesday at 10:00 o'clock. The references to "information" during this conversation were somewhat more descriptive, as per the following comments: "I'd tell my wife to take this information to you, put it in a package or something like that . . . Deduct the plane fare out of it, that's your problem. You know, write it off on your income tax." The general conversation evolved about Mr. Hart's impatience with Mr. Atkinson for not keeping his last appointment with the information and concluded with confirmation of the Tuesday appointment.

An inquiry was again made of Mr. Atkinson at the outset of the transcribed recorded telephone conversation of December 26, 1969 (Government Exhibit No. 3) whether he had the information. He was evidently quite surprised when Hart informed him that he was in Goldsboro and would see him in about five minutes. He now replied that he had to pick up the information where he had it in town. Mr. Hart suggested that he accompany Mr. Atkinson to which Atkinson replied: "That won't put you where my stash is will it?" Arrangements were then made for Atkinson to pick up Hart in his brother's automobile in five minutes at a designated location, and the conversation was concluded.

Mr. Herman Jackson, an alleged business partner of Leslie Atkinson, also testified on behalf of the government at the New York trial and stated that Mr. Hart arrested him for a narcotics offense in February 1969 in Mr. Atkinson's home in Goldsboro, North Carolina; that on or about November 6, 1969, he was sharing a room at the Americana Hotel with Leslie Atkinson in New York City; that he gave Leslie Atkinson $20,000.00 he had in a bag in the hotel room; that Atkinson left with the money about 11:30 p.m. or midnight; that when he returned later that night he did not have the money and told Jackson that Hart and Patch were downstairs waiting for him; that pursuant to their instructions he followed them to somewhere on the

West Side Highway; and that when he stopped his car, Mr. Patch came back and removed the money from the car. Mr. Jackson testified further that $10,000.00 of the money belonged to him and that he was under indictment at the time.

Inspector John E. Thompson, Bureau of Narcotics and Dangerous Drugs, testified at both the New York trial and the Commission hearing. He stated that he was one of the agents assigned to investigation of the case involving Dennis Hart and Richard Patch; that as a part of his duties he interviewed Leslie Atkinson who informed him of various phone calls he had received from Dennis Hart and that he had the tape recording of the telephone conversation between Atkinson and Hart on December 17, 1969 transcribed, which appeared in evidence as CSC Hearing Exhibit No. 1. He testified further that he had arrested Messrs. Hart and Patch on December 26, 1969, accompanied by Inspector Yates; that prior to the arrest he had made arrangements with Leslie Atkinson whereby he gave Atkinson a package of money with the understanding that Atkinson was to place it on the floorboard of the automobile in which Mr. Hart was either the driver or passenger; that Hart and Patch were in the same automobile when they were arrested; that he and Inspector Yates both searched the automobile and Hart and Patch, but found no money; that Mr. Atkinson later returned the money to him; that he (Thompson) had not followed through on the arrangements he had made with Atkinson and had informed Atkinson that if he (Atkinson) placed the money within the car Hart had custody of or on his person, Mr. Hart would be arrested.

Inspector Thompson testified further to a lie detector test that had been administered to Leslie Atkinson since investigation of the case at the request of the Bureau of Narcotics and Dangerous Drugs; that Mr. Atkinson originally requested to take the test; that the polygraph expert found Atkinson had lied relative to what happened in North Carolina; that he (Thomp-

son) gave the Justice Department this information prior to the trial of the case in Brooklyn against Hart and Patch in which the jury returned a verdict of guilty, and later resulted in a mistrial in that this information was not brought to the attention of the court and jury.

Inspector Thompson prepared a report of the arrest of Messrs. Hart and Patch on December 26, 1969, which appears as CSC Hearing Exhibit No. 2. This report is hereby incorporated into this decision in that Inspector Thompson reported in detail the events of December 26, 1969, which precipitated the arrest and the information contained therein was substantially testified to at the New York trial in support of the government's case.

"Report of Arrest of Dennis J. Hart and Richard M. Patch on Charges of Accepting and Soliciting a Bribe

By Inspectors Walter T. Yates and John E. Thompson
in Goldsboro, North Carolina
on December 26, 1969

"On February 8, 1969, William Henry Herman JACKSON, commonly known as Herman JACKSON, and seven others were arrested in New York City for the importation of heroin, CI-69-0093. On March 19, 1969, Leslie ATKINSON was arrested in Goldsboro, North Carolina, as a defendant in the above mentioned case. JACKSON and Leslie ATKINSON subsequently stated to agents of the Bureau of Narcotics and Dangerous Drugs that they were responsible for the importation of the seized heroin into the United States.

"CI-69-0093 was the result of an investigation directed by Special Agent Dennis J. HART, Region No. 2, New York, Bureau of Narcotics and Dangerous Drugs. The informant in this case was one Robert CLEMONS who was found shot to

death on October 26, 1969, in Brooklyn, New York. As a result of the informant's not being available to testify on November 10, 1969, defendants Leslie ATKINSON, Herman JACKSON and Edward ATKINSON were allowed to enter guilty pleas to one count of violation of 26 USC 4704(a), possession of heroin. Sentencing of these defendants was deferred pending their cooperation with the Government in the investigation of illicit narcotic traffic.

"On December 6, 1969, HART transferred from the Bureau of Narcotics and Dangerous Drugs to Alcohol, Tobacco and Firearms Division of Internal Revenue Service and was detailed to the Springfield, Illinois, Alcohol, Tobacco and Firearms Office.

"On December 11, 1969, information was received from an informant, previously proven reliable, that Leslie ATKINSON and JACKSON had paid a sum of money to HART for HART's aid in the narcotic case pending against them.

"On December 11, 1969, Deputy Regional Director William Olivanti and Inspector Thompson interviewed Herman JACKSON in Goldsboro, North Carolina. JACKSON readily admitted his part in smuggling the seized heroin into the United States. JACKSON stated that there were actually approximately 17 kilograms of heroin seized rather than the 10 kilograms turned in by the agents as evidence. JACKSON also stated that approximately $14,000 in cash had been seized by the agents from co-defendant, Pearl PARKS, but that only $8,000+ had been reported by the agents as being seized. JACKSON further stated that Special Agent HART had been paid $20,000 by Leslie ATKINSON. JACKSON stated this money had been paid because HART had told ATKINSON that, if he received $75,000 from him, he could arrange the case in such a way that all defendants would be turned free. JACKSON stated that this payment was made on the night of

the last day of the hearing in the Eastern District of New York on the defendants' motion to suppress the evidence. JACKSON stated that, since this payment, ATKINSON had been receiving numerous telephone calls at his residence in Goldsboro, North Carolina, from HART. JACKSON stated that HART was attempting to have ATKINSON meet him at the St. Louis Airport in order to collect more money from ATKINSON. JACKSON stated that ATKINSON was avoiding these meetings by making various excuses to HART because ATKINSON did not have the money with which to pay HART.

"On December 16, 1969, Leslie ATKINSON was interviewed at Goldsboro, North Carolina, by Special Agent Phillip R. Smith, Deputy Regional Director Olivanti and Inspector Thompson. At that time ATKINSON refused to cooperate but did state that he had not offered a bribe to anyone for helping in his case. ATKINSON stated that his reason for refusing to cooperate was that he feared for his life and for the lives of the members of his family.

"On December 19, 1969, Inspector Thompson received information that HART had made arrangements with ATKINSON to meet ATKINSON at the St. Louis Airport at 8:00 p.m. on December 19, 1969. A surveillance team of Inspectors and Special Agents headed by Inspector Francis J. Pryal observed HART at the St. Louis Airport placing a telephone call from a pay telephone shortly after 8:00 p.m. on December 19, 1969. The surveillance team observed Richard M. PATCH in the company of HART while at the airport on this date.

"On December 20, 1969, Inspector Thompson received reliable information that ATKINSON had received a telephone call from HART during the evening of December 19, 1969, and that HART was calling from the St. Louis Airport. This reliable iinformant further stated that HART had arranged with ATKINSON to meet him at the St. Louis Airport on December 23, 1969, at 10:00 a.m.

"Arrangements were made by Mr. Dennis Dillon, U. S. Justice Department Attorney, Eastern District of New York, for Inspectors Robert W. Goe and John E. Thompson to overhear and record a telephone call in ATKINSON's residence on December 23, 1969, in the event HART again called ATKINSON from the St. Louis Airport.

"On December 23, 1969, at approximately 11:30 a.m. EST, Inspector Goe overheard on an extension phone a telephone call to Leslie ATKINSON from a person presumed to be HART. (See Inspector Goe's report dated January 5, 1970, concerning this conversation.) Recordings of this conversation were made from two extension telephones in ATKINSON's residence. Neither of these are legible due to radio interference.
"On December 23, 1969, at approximately 10:30 a.m. CST, a surveillance team headed by Inspector Pryal observed HART placing a telephone call from a pay phone in the St. Louis Airport. At that time HART was again accompanied by PATCH. The surveillance team ascertained that PATCH was holding an airline ticket, and it was determined that PATCH's wife and child were traveling that date to Greensboro, North Carolina. Investigation on December 23, 1969, by Special Agents stationed in Greensboro, North Carolina, disclosed that PATCH had rented a Mustang automobile from the Hertz agency at the Greensboro Airport which bore North Carolina license tags 785 C at approximattly 6:00 p.m., December 23, 1969.

"On December 26, 1969, Inspectors Walter T. Yates and John E. Thompson were in Goldsboro, North Carolina. At approximately 4:00 p.m., Inspector Thompson received a telephone call from Leslie ATKINSON who stated that he had just received a telephone call from HART. ATKINSON stated that HART had told him that he was in Goldsboro, North Carolina, and had instructed him to meet him right away at the Pure Oil Truck Stop in Goldsboro, North Carolina. ATKINSON further stated that HART had asked him if he had the money

to pay him, and ATKINSON had told HART that he did. ATKINSON stated that he had told HART that he would meet him and asked Inspector Thompson to furnish him with a package of money to give HART. At this time ATKINSON told Inspector Thompson that he would cooperate with the Inspectors in this investigation to the fullest extent. Arrangements were then made for Inspectors Yates and Thompson to meet with ATKINSON in the rear of ATKINSON's brother's house at 213 North Carolina Street, Goldsboro, North Carolina.

"At approximately 5:25 p.m., Inspector Yates observed HART seated in a 1969 Cadillac with a man identified by Inspector Thompson as Leslie ATKINSON. The Cadillac was parked on North Carolina Street in the vicinity of 213 North Carolina Street, Goldsboro, North Carolina.

"At approximately 5:30 p.m., Inspectors Yates and Thompson, accompanied by Ellis SUTTON, entered the rear of Dallas ATKINSON's home. At approximately 5:40 p.m., Leslie ATKINSON entered this residence by the front door and met with the Inspectors in the rear room. ATKINSON stated that he had told HART that the money he was to give to HART was at a cache in the country about 18 to 20 miles from Goldsboro and tnat it would be necessary for him to send his brother, Dallas, to get the money. The Inspectors informed ATKINSON that they had a package of money to give HART and would give it to ATKINSON when appropriate ararngements for the delivery to HART and HART's arrest in possession of the money could be made. Arrangements were then made between ATKINSON and his brother, Dallas, to have it appear to HART that they were proceeding to get the money.

"Shortly after 6:00 p.m., ATKINSON, accompanied by Dallas ATKINSON, returned to 213 North Carolina Street and met with Inspectors Yates and Thompson. ATKINSON stated that HART refused to enter a house to receive the money from ATKINSON. ATKINSON stated that HART instructed him

to go with his brother to pick up the money and take it in his brother's car to the Pure Oil Truck Stop, park the car, enter the truck stop and get a cup of coffee. ATKINSON stated that HART instructed him to leave the car vacant with the money in it for approximately 10 minutes. ATKINSON was instructed to leave the money to be furnished him by the Inspectors as instructed by HART. ATKINSON was informed by the Inspectors that, if and when HART took this money from the car, he would be arrested. Inspector Thompson handed ATKINSON a package containing $500 of which the serial numbers had been previously recorded at approximately 6:25 p.m.

"Inspectors Yates and Thompson then proceeded to the Pure Oil Truck Stop located on Route 117 by-pass, Goldsboro, North Carolina. At approximately 6:35 p.m., Inspectors Yates and Thompson observed ATKINSON and his brother drive a 1960 rust-colored Oldsmobile into the truck stop and park at the north front corner of the restaurant. The two left the car and entered the restaurant.

"At approximately 6:30 p.m., Inspectors Yates and Thompson observed a light blue Mustang enter the parking area of the truck stop, and HART emerged from the passenger side. The vehicle was then driven to several different positions on the north and north rear parking areas of the truck stop. HART was observed approaching the 1960 Oldsmobile. Because of position, the Inspectors were unable to see whether or not HART entered the vehicle. HART was then observed entering the restaurant. Two or three minutes later, HART was observed leaving the restaurant, walking past the front of the Oldsmobile and then hastening to the Mustang which was located in the north parking area beside the restaurant. HART hastily entered the passenger side, and the car was driven out of the parking area and proceeded south on Route 117 by-pass. Inspectors Yates and Thompson proceeded in their vehicle to the rear of the 1960 Oldsmobile, where they stopped, and Inspector Thompson hur-

riedly searched the floorboard under the driving wheel and found no package there. The Inspectors then proceeded south on Route 117 by-pass, pursuing the Mustang which made a "U" turn and proceeded north on Route 117 by-pass, a divided highway. The inspectors followed the Mustang to the Newsome Sinclair Service Station, 1215 South George Street, at the intersection of Route 117 by-pass. The Mustang was driven into this service station and stopped near the front door of the service station. HART emerged from the vehicle, and he and the driver of the vehicle, Richard M. PATCH, were placed under arrest by Inspector Thompson. Inspector Yates took custody of HART and searched him for weapons. Inspector Thompson searched PATCH for weapons. Both PATCH and HART were found to be unarmed. During this, Inspector Thompson advised both PATCH and HART they were being arrested for extortion. Inspector Thompson advised them of their rights as to making any statements. The Mustang was searched with negative results, parked and locked at the service station.

"HART and PATCH were then taken to the Goldsboro Police Department for detention. Because there were no detention facilities available there, the two were taken to the county jail, and booking proceedings were started. It was then determined that the two could be temporarily detained and interviewed at the County Sheriff's office in Goldsboro. Inspector Yates accompanied them to this office. Inspector Thompson arranged with U. S. Commissioner Jack Wright, Goldsboro, North Carolina, to meet with him and to prepare a complaint against HART and PATCH. This was done that evening in the City Magistrate's office, Goldsboro, North Carolina. HART and PATCH were photographed and fingerprinted and then brought before U. S. Commissioner Wright who gave each defendant a copy of the complaint to read. The Commissioner advised each defendant of his right to remain silent and the right to be represented by an attorney. Both defendants waived preliminary hearing and signed waivers for the advice of an attorney. The

Commissioner set bond in the amount of $4,000 for each defendant and required a 10 per cent cash deposit. This deposit was furnished by each defendant, and they were released.

"Inspectors Yates and Thompson took HART and PATCH back to the Mustang located at the Newsome Sinclair Service Station. Inspectors Yates and Thompson were joined at this location by Inspectors Pryal and Morgan. Just prior to the time HART and PATCH left the area in the Mustang, all four Inspectors noted that the rear license plate of the Mustang was covered with mud, which made it extremely difficult to read the license number without very close inspection. The rest of the car was clean. Inspector Thompson removed enough mud from the license plate to ascertain the number to be North Carolina 785 C.

"Inspector Yates found an Eastern Airlines ticket in HART's possession. The ticket, made out in the name Mr. W. Young, was for Flight 271 F leaving St. Louis 8:00 a.m., December 26, 1969, terminating in Atlanta, Georgia. This portion had been used. The unused portion was for a flight on December 26, 1969, from Raleigh, North Carolina, to Atlanta, Georgia, and from Atlanta, Georgia, to St. Louis, Missouri. The writing on this portion of the ticket was not legible as to flight times and numbers. Records of Eastern Airlines have been requested concerning this ticket. HART stated to Inspectors Yates and Thompson that he had made reservations under several names because of the heavy holiday traffic. HART stated to Inspectors Yates and Thompson that he had been notified of the death of PATCH's father in Southern Pines, North Carolina by PATCH the night of December 25, 1969. He stated he had traveled to North Carolina in order to attend the wake.

"Mrs. Brown of the Eastern Airlines reservation office, Charlotte, North Carolina, informed Inspector Thompson on January 12, 1970, that a reservation in the name of Mr. W. Young

had been made in St. Louis, Missouri, on December 23, 1969, for Flight 271 on December 26, 1969, from St. Louis to Atlanta, Flight 386 from Atlanta to Raleigh, North Carolina, with return on December 26, 1969, on Flight 39, Raleigh to Atlanta and Flight 737, Atlanta to St. Louis. Mrs. Brown found no reservations with Eastern Airlines in the name of HART for any flights from St. Louis on December 26, 1969."

Messrs. Hart and Patch were interviewed shortly after their arrest at the Wayne County Sheriff's office by Inspectors Yates and Madden. The report of this interview appears as CSC Hearing Exhibit No. 3. This report is also incorporated verbatim into this decision in that Messrs. Hart and Patch have repeatedly contended that the statements made by them during the interview were true and they substantially testified to the same in their defense in the criminal proceedings against them. Mr. Hart testified the report was accurate, but not complete.

"Report of Interview of Dennis J. Hart and Richard M. Patch
by Inspector Walter T. Yates and Special Agent James Madden
at the Wayne County Sheriff's Office on December 26, 1969

"On December 26, 1969, Dennis J. HART and Richard M. PATCH were arrested in Goldsboro, North Carolina. The subjects were advised of their rights as follows: You have the right to remain silent. Anything you say can be used against you. You have the right to talk to an attorney before answering any questions. If you cannot afford an attorney, one will be appointed for you before you answer any questions. If you wish to answer questions now, you have the right to stop at any time. Both subjects orally agreed to waive their rights and discuss their reasons for being in Goldsboro. Both subjects were in the same room and could hear and participate in statements made by each other.

"Richard PATCH stated that on December 25, 1969, he telephoned Dennis HART at HART's mother's home in Springfield, Illinois, at about 8:00 p.m., EST. PATCH stated that his (PATCH's) father had been sick, and HART was aware of this. He said that HART had asked him to call if his father died. PATCH stated that when he advised HART that his father had died, HART had said he was coming down near PATCH's dad's home to talk to an informant about a gun deal and asked PATCH to meet him at the Raleigh airport. PATCH said he understood from the telephone call that he and HART would swing by the informant's house (in Goldsboro) and that HART would go home with PATCH to attend his dad's funeral on Saturday.

"PATCH stated he picked HART up at the Raleigh, North Carolina, airport at about 2:30 p.m. on December 26, 1969, and at that time told HART that he did not want to get involved with any informant. PATCH said they got to Goldsboro, North Carolina, between 3:30 and 4:00 p.m., and he drove HART around Goldsboro trying to find the informant's house, but they could not find the house.

"PATCH said HART called from a pay telephone near the 117 Pure Oil Truck Stop. PATCH said a guy showed up at the truck stop and met with HART, but he (PATCH) did not know the subject. PATCH said he did not know what was said, but HART later told him that the guy had asked if PATCH was his partner. (Shortly after making the last statement PATCH said, 'Let's scratch that out—looks like a big conspiracy or something.') PATCH said HART and the other subject went into the 117 truck stop restaurant, and he at first stayed outside but then went inside to hurry them up.

"PATCH said both subjects got up and left the restaurant, and he did not know where they went. PATCH said he went to Griffin's Barbeque and then went back to the Pure Oil Truck Stop and waited for HART to return.

"PATCH said that HART returned alone and said that the guy had gone somewhere to get some information but it wouldn't take but a few more minutes. PATCH said that when HART returned, they sat in the Mustang he (PATCH) had been driving, and subsequently a car came to the truck stop, and HART stated that he thought that was the guy they were waiting for. PATCH said HART got out of the Mustang and walked to the front of the restaurant and out of sight.

"PATCH said HART was gone less than five minutes and then came back and got into the Mustang. PATCH said he started driving from the area, and HART said that guy's pulling my 'p - - - -'—that something was funny about the whole thing. PATCH said HART suggested that he pull off in a nearby service station and let him get some cigarettes. PATCH said that after they stopped, they were approached by Inspectors Thompson and Yates and told that they were under arrest.

"PATCH asked that the statement show that the Inspectors searched him and pulled out some of his money and asked him if he had any more money, at which time he told Inspector Thompson 'no,' and Inspector Thompson advised him that the Inspectors were going to search the car. PATCH further stated that he wanted the statement to reflect that the Inspectors did search his car, and both Inspectors told him that they didn't find any money.

"Dennis HART indicated agreement with PATCH's statements insofar as they pertained to him (HART). HART said that when he and the other guy, Leslie ATKINSON, left the restaurant, they entered a late model blue Cadillac, and ATKINSON stated he was going to his brother's house to get an address involving a gun suspect that HART was interested in. HART said these guns were supposed to be coming from Thailand. HART said they went to a location which was unknown to him where ATKINSON parked the vehicle. HART said ATKIN-

SON got out of the vehicle, but he remained seated in the vehicle. HART said ATKINSON came back and told him that his brother was not there.

"HART said that they drove to the colored part of Goldsboro, and ATKINSON went into some kind of club—VFW, Elk or some kind of club. HART said he didn't know where this club was but that it wasn't far from ATKINSON's brother's house. HART said ATKINSON came back and told him that his brother wasn't in the club either and that they then drove around looking for the brother in various parts of the town and subsequently returned to the brother's house. HART said they again parked near the house as before, and ATKINSON went into the house. HART said ATKINSON came back and said his brother would be back any minute, 'He was hunting.'

"HART said they drove around the block and again returned to the brother's house, and he saw a guy get out of a car with a whole bunch of rabbits and a shotgun. HART said the guy with the rabbits went into the same house ATKINSON had previously gone into. HART said ATKINSON went back into the house and then came back to where he was sitting, and he asked him if the guy with the rabbits was his brother. HART said ATKINSON stated that was his brother's friend, but his brother was also in the house. HART said ATKINSON stated his brother had to go get the gun suspect's address but was waiting for his wife to return with the car.

"HART said he told ATKINSON to drop him back at the truck stop and go get the information. HART said ATKINSON took him back to the truck stop, and some other guys followed in another car. HART said when they got back to the truck stop, ATKINSON got out of the Cadillac and got in the car with the other guys and they drove off. HART said ATKINSON stated they would be back in about half an hour.

"HART said he got into the Mustang with PATCH which was parked on the truck stop lot. HART said ATKINSON came back in about half an hour. He said he did not actually see ATKINSON return, but he saw two guys come back and recognized ATKINSON get out of a car. HART said he walked up the restaurant, and ATKINSON was waiting in a booth with another colored guy near a window. HART said he did not recognize the other colored guy. HART said ATKINSON got up, and he (HART) turned around and walked back toward the side of the building. HART said when he got to the corner of the building, ATKINSON had not come out of the door, and he (HART) walked into the restaurant.

HART said ATKINSON was standing near a telephone booth and rest-room, and he (HART) stepped into a telephone booth and asked ATKINSON if he had the information. HART stated ATKINSON said the boy wasn't there, and HART said he told ATKINSON to come into the rest-room, and he asked him what he meant the boy wasn't there and what he was talking about. HART said ATKINSON stated he would have to go back later. HART said he accused ATKINSON of pulling his "p—" and then walked out of the restaurant. HART said as he walked out, ATKINSON said there would be a maximum of 30 of them, but he (HART) just kept walking. HART said the 30 meant 30 guns to him (HART) because that's what they had been talking about.

"HART stated that he got back into the Mustang with PATCH and told PATCH the guy (ATKINSON) was giving him a hand job and that something stunk. HART said they drove down the street and back to a service station and stopped to get a package of cigarettes. HART stated that when he got out of the car, Inspectors Thompson and Yates said to put up your hands, you're under arrest. He said he asked for what and was told, he thought by Inspector Thompson, the arrest was for extortion. HART said his hands were handcuffed behind

his back by Inspector Yates. He was shown a badge and asked if he had any money on him. He said that he replied that he had some money in his wallet, and the money was taken out of the wallet by Inspector Yates and determined to be $350. HART said that Inspector Thompson said, "He's got a whole lot more money than that," and the Inspector proceeded to search the car.

"HART stated that he had been talking to ATKINSON off and on since he had arrested him for a narcotics violation. He said that they 'have been talking about junk, gems, gold, all black market and money exchange business, the whole smuggling operation in Southeast Asia.' HART said this was for official purposes and was all documented in the files. HART said that when he was sure he was going to work for Alcohol, Tobacco and Firearms Division, he started talking more explicitly to ATKINSON about guns because that was the type of violation he was interested in. HART said he thought the first time he told ATKINSON he was leaving narcotics and going to Alcohol, Tobacco and Firearms Division was when he debriefed him sometime in November of 1969. HART said he told ATKINSON his main concern was firearms violations, and he was interested in machine guns. HART said ATKINSON had stated he had some good information and had asked if it would do him any good on his case. HART said he told ATKINSON that it would not do him any harm.

"HART said that right after ATKINSON pled guilty to a tax count, which he thought was in the first week of November, he (HART), Tom Dugan, Assistant U. S. Attorney Dillon and Herman JACKSON had a meeting. HART said that on this occasion ATKINSON and JACKSON asked Dillon what story they could tell the people on the outside as to why they were not in jail. HART said Dillon told them to tell the people anything, tell them you paid us off, tell them you paid off the U. S. Attorney. HART suggested that the interviewers talk

to Regional Director Durkin and Deputy Regional Director Theisen, particularly Theisen, because he (HART) had talked to Theisen at length about this investigation. HART said there is a memorandum regarding ATKINSON's offering him $50,000 or junk, or both, and that he (HART) had talked to Theisen at length about the memorandum in front of Assistant Regional Director Maher.

"HART said he had talked to Regional Director Durkin, Deputy Regional Director Theisen and Assistant Regional Director Maher and explicitly stated that he wanted to go ahead and try to make a bribery case on ATKINSON. He said he was told by Theisen that they, the Bureau and Durkin, had decided not to go along with it. HART said that Theisen stated, in their opinion, this might taint the narcotic case and, "You will have the Inspectors in here stirring up a lot of s—." HART said he mentioned his feelings about making the bribery case to Dennis Dillon, Assistant U. S. Attorney, and Dillon wanted to go along with it also. He said Dillon shared his (HART's) views, but he told him the Bureau put the "kibosh" on it.

"HART said right before he left the Bureau or right after he gave his notice to Durkin, Durkin mentioned the ATKINSON, et al. case and said, "Watch your flank." HART said this meant to him that he should watch out for himself and not let this guy (ATKINSON) set him up."

Mr. Dennis Dillon, Special Attorney, Department of Justice, testified at the New York trial that he knew Dennis Hart when he was an agent with the Bureau in New York; that he (Dillon) handled the prosecution cases against the two Atkinson brothers and Herman Jackson; that at a hearing on a motion to suppress in November 1969, Mr. Hart gave testimony to support the legality of a search that had been made; that it had been made; that it had been arranged the defendants would be allowed to take a plea to a tax count and if the defendants'

cooperation was not deemed sufficient by Mr. Hart and the Bureau of Narcotics, defendants' attorney would be allowed to withdraw that plea and the government would go ahead on the substantive counts; that he had conversations with Atkinson and Jackson about their cooperation and what they were going to furnish; that in December 1969, he had a conversation with Leslie Atkinson and informed him that his cooperation would be made known to the sentencing judge; that it had come to his attention there was an allegation Agent Hart had taken a bribe from Leslie Atkinson and if he (Atkinson) would cooperate and tell the agents what had happened with respect to that incident that that would be made known to the sentencing judge and could help his sentence.

Mr. Thomas A. Maher, Assistant Regional Director, Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, testified at the same trial that in September or fall, 1969, he had a series of conversations with Dennis Hart regarding Leslie Atkinson in which Hart mentioned to him that there were overtones of a possibility Atkinson may be offering him money; that Hart made the suggestion to go along with this to infiltrate the organization or maybe arrest Atkinson in the process of exchanging money.

Mr. Thomas F. O'Grady of the Federal Bureau of Narcotics and Dangerous Drugs testified at the trial that he was an agent for the Bureau; that he was one of Denns Hart's closest friends on the Bureau; that he had a conversation with Dennis in September of 1969 about Leslie Atkinson; that Dennis informed him Atkinson had offered him a bribe of either $50,000.00 or $60,000.00; that he told Dennis he should put the matter down on paper and pursue it actively in the interest of making a bribery case, and other agents would be present to observe; that Dennis agreed with him and reported the bribe offer in writing to his superiors.

Mr. Bernard Theisen, called as a defense witness at the trial, testified that he was the Regional Director of the Miami Office, Bureau of Narcotics and Dangerous Drugs; that he had met Richard Patch in Chicago sometime in the early sixties and Mr. Hart in New York in early 1968; that he had occasion to work with both men and observe their performance as agents; that they were capable agents when they worked with him; that Mr. Hart had several conversations with him about Mr. Atkinson, with whom he had worked for about six months; that as a result of one of the conversations Mr. Hart had with Mr. Atkinson, he (Hart) indicated that he felt Atkinson was trying to get to him with money; that pursuant to Mr. Thiesen's instructions, Mr. Hart produced Atkinson in his office and he (Thiesen) told Atkinson, he had not come up with any concrete results, that he had better get moving and that he (Thiesen) told him (Atkinson) he thought he was one of the best con men he (Thiesen) had ever seen; and that he (Thiesen) was pretty unenthusiastic about Mr. Atkinson's work for the Bureau. On cross-examination Mr. Thiesen referred to a meeting with Mr. Hart and others on September 22, 1969, during which he asked Hart whether Atkinson had offered him any money or words to the same effect; that the answer was "no" with an explanation; that the disposition of the Leslie Atkinson case depended upon his performance as an informant and that the instant case was not pending at the time.

Mr. Richard M. Patch has consistently denied that he was in New York on November 6, 1969, that he took $20,000.00 from Leslie Atkinson, that he never solicited any money from him; and stated that the first time he ever saw Mr. Atkinson was on December 26, 1969. A witness, Mr. William B. Kelleher, Attorney-at-Law testified at the trial that he had met Mr. Patch about four or five years ago, was a friend of his and was engaged to represent him in transactions for an eatery franchise; that he telephoned Patch long distance at his home in Independence, Missouri after 5:00 p.m. on the evening of November 6, 1969,

and talked to him for two minutes regarding the franchise and made arrangements to meet Patch the following day at the Kansas City Airport.

Mr. Patch further testified in substance that the several telephone calls he made to Mr. Hart in New York from his home in Missouri and received from Hart were for business reasons as well as the meeting that he had with Hart during 1969 in New York and at the St. Louis Lambert Field Airport on December 17, 19 and 23, 1969. He stated that Mr. Hart was one of his closest friends; that when he was terminated by the Bureau of Narcotics he was told not to associate with other agents from the Bureau and he did not want to jeopardize Mr. Hart's position. He testified that he had no independent knowledge of Hart's informant other than what Hart had told him and described meeting Hart in North Carolina and driving him to Goldsboro to contact the informant before going to his home to attend his father's wake and the subsequent arrest of the same date.

The appellant testified to working on a case against Leslie Atkinson when employed as an agent for the Bureau of Narcotics and Dangerous Drugs which culminated in Atkinson's arrest in March 1969. He testified further to the subsequent meetings that he had with Atkinson to develop him as an informant and the informal agreement that was made to utilize Atkinson before the sentencing on his narcotics charge; the efforts and insinuations which Atkinson made to bribe him, his reporting the same to his superiors in the Bureau on November 22, 1969, verbally and by memorandum, and his transfer to the Bureau of Alcohol, Tobacco Tax and Firearms on December 8th or 9th, 1969, and the turning over of his cases to another agent, Mr. Salvemini, at the time of or pior to his transfer.

Mr. Hart has consistently contended in his testimony at the criminal trial and the Commission hearing that his several

efforts to arrange a personal meeting with Mr. Atkinson were for the purpose of a face-to-face confrontation to finally determine whether Mr. Atkinson had any information for him relating to narcotics and later firearms so that when the time came for Atkinson to be sentenced, in the near future, he could not state to the judge that he had information for the government, but was not able to cooperate because he was not able to contact the appellant.

Mr. Hart emphatically denied that he ever received any money from Mr. Atkinson or proposed the offer of a bribe in any form. He testified to the telephone calls that he made to Leslie Atkinson on December 17, 19 and 23, 1969, from the St. Louis Airport to Goldsboro, North Carolina when Atkinson did not appear at the airport according to arrangements made by him (Hart) with Atkinson for these dates; and that Mr. Patch was present during these times so that they had an opportunity to discuss and make preparations for their future franchise business. Appellant testified further to flying to Goldsboro, North Carolina on December 26, 1969, to talk to Leslie Atkinson to develop a gun case and other worthwhile information concerning narcotics and guns to assure that he (Hart) had made every effort to personally contact Atkinson before his date of sentence a week or two thereafter; and that the other reason was to attend the wake of Mr. Patch's father. He testified further in detail to Patch meeting him at the Raleigh Airport and driving him to Goldsboro, North Carolina, the contacts and events which occurred with Leslie Atkinson and the subsequent arrest by Inspectors Thompson and Yates.

There has been no evidence introduced of record that the appellant at any time subsequent to his transfer to the Bureau of Alcohol, Tobacco Tax and Firearms on December 8th or 9th, 1969, ever informed any of his superiors or fellow agents in that agency or in his former Bureau that he was attempting to arrange a meeting with Leslie Atkinson and/or that he was

finally going to make a trip to Goldsboro, North Carolina to personally contact him. Among the documents submitted by the agency is Government Exhibit #22, a copy of the daily report prepared by Mr. Hart to the Assistant Regional Commissioner (Alcohol, Tobacco and Firearms) of his activities on December 17, 1969. There is no mention therein of a telephone call made to Leslie Atkinson at Goldsboro, North Carolina from the St. Louis Airport, or that Mr. Hart was even at the St. Louis Airport on that date. To mention this would have been to his advantage in that he would have been allowed mileage for the distance traveled in his private owned automobile to and from the airport in addition to his other activities, and he further could have claimed the expense of making the long distance call on the telephone.

The only person of record who knew of Mr. Hart's several attempts to arrange a meeting with Mr. Atkinson was Mr. Richard Patch. He was present on the three dates of December 17, 19 and 23, 1969, when Mr. Atkinson failed to appear for his prearranged meetings at the St. Louis Airport. Mr. Patch's home, at the time, was approximately 220 miles from the airport; whereas, the appellant lived approximately 100 miles from the airport. They both testified that they used the airport as a meeting place to discuss their plans for future partnership in a franchise eatery business. This was the same Mr. Patch who was allegedly present at meetings that Mr. Hart had with Mr. Atkinson at the Drop-In on Staten Island in New York on October 8th and November 3rd, 1969, which was denied, as well as the event of November 6, 1969, when money was received from Mr. Atkinson, for which Mr. Patch provided an alibi witness at the New York trial. In addition, Patch arranged to meet appellant at the airport in Raleigh, North Carolina and drive him to Goldsboro, North Carolina, in order for Hart to contact an informant of whom he claimed to have no appreciable knowledge after which they were to attend a wake for Patch's father. By his own admission, Mr. Hart stated that

he only allowed about four and one-half hours between arrival at Raleigh and the return flight to St. Louis. It is noted from the Carolinas map provided by the agency that the distance from Raleigh to Goldsboro is approximately 50 miles; the distance from Goldsboro to Southern Pines, where the wake was allegedly held, is at least 75 miles, with no direct commuting routes; and the distance from there back to Raleigh is about 60 to 65 miles. Mr. Hart testified that he expected to accomplish traveling these respective distances, contact his informant and attend the wake all within a time frame of four and one-half hours.

This is rather untenable when the distances between these locations is taken into consideration. The plane reservations for December 26th were made on December 23rd when Patch had met Hart at the St. Louis Airport. However, there is no evidence of record that Hart made any effort to have his reservations changed on the morning of December 26th before he left the St. Louis Airport or after he had received a telephone call the evening before from Patch in which he informed Hart of his father's death. The evidence of record further indicates that Hart was not properly attired to attend either a funeral or wake on the 26th in that he did not even bother to wear a tie, which is proper in these regions and he must certainly be aware of the same. In other words there is no evidence of record to the effect that Mr. Hart in any way altered his plans to accommodate his attending the funeral or wake of Patch's father, after the death was made known to him.

Mr. Hart has consistently contended that his several efforts to personally contact and arrange a meeting with Leslie Atkinson were in the interests of the government as well as for purely subjective reasons; i.e., for recognition for outstanding work by both his current and former employing agencies. However, he was not authorized to further pursue Mr. Atkinson for additional information. When transferred from the Bureau of Nar-

cotics and Dangerous Drugs, he properly turned over the Atkinson case to another agent who was then assigned to work on that case. There has been no showing that Mr. Hart in any manner elected to cooperate with this agent. He chose to work on an independent basis on a case that was no longer assigned to him and further did not make this known to anyone within that Bureau.

Mr. Hart testified further that Mr. Atkinson was his informant and he was now interested in information about guns in addition to narcotics since his transfer to the Bureau of Alcohol, Tobacco and Firearms. There is no evidence anywhere of record to the effect that Mr. Atkinson had ever engaged in any illegal activity other than narcotics. If Mr. Hart was seeking information regarding firearms from Atkinson, he chose not to report the same to his current employer as would have been proper under the circumstances.

The record is replete with testimony that Mr. Atkinson made overtures to compromise or bribe Mr. Hart, and that the same was reported both verbally and by memorandum to the Bureau. The two principal witnesses against Mr. Atkinson and his colleagues on the narcotics charge were the appellant and an informant, Bobby Clemons. As the record indicated, Mr. Clemons was murdered and the only remaining witness against Mr. Atkinson, et al. was the appellant. Mr. Atkinson dealt almost exclusively with the Bureau through Mr. Hart. Any information which Atkinson would care to divulge would, therefore, be given to the appellant. This placed Mr. Hart in a very enviable controlling position. There was no identifiable information report by Mr. Hart of record, which he received from Mr. Atkinson. Even if Mr. Hart was no longer the agent who was assigned to work with Mr. Atkinson after he transferred from the Bureau of Narcotics, he could always be subsequently utilized as a witness against Mr. Atkinson even though he (Hart) no longer had an official interest in the case.

Being an experienced and knowledgeable investigator, Mr. Hart was well aware of the advantages to be utilized in such a situation. He had done what was required of him, as an agent, in reporting the attempt to compromise him. Mr. Hart represented a threatening authoritarian figure to Mr. Atkinson from the standpoint of his knowledge relative to Mr. Atkinson's activities with narcotics and what he may divulge to the prosecuting authorities in the pending case against Mr. Atkinson. It is noted that in the three recorded telephone conversations of December 17, 19 and 23, 1969, Mr. Atkinson never responded in a curt or angry manner to the abusive remarks or obscenities that Mr. Hart made to him over the telephone. This same attitude was also characteristic of Mr. Atkinson when he was personally met by Mr. Hart on December 26th and their communication on that day.

Mr. Hart endeavored to have Atkinson meet him at the St. Louis Airport on three separate occasions: December 17, 19 and 23, 1969. On each occasion Mr. Patch was there and he knew that Atkinson was expected. It can only be concluded that Patch was summoned to the airport at the request of Mr. Hart. For him to appear and discuss business on three separate occasions, when he lived over 200 miles away, in such a brief time span is not plausible. The only remaining conclusion is that Hart wanted Patch to be present in the event Atkinson should appear at the pre-arranged meeting place. Had this been done in furtherance of official business, arrangements could then have been made for another agent of the Bureau to be present instead of Patch, who was unemployed at the time and from all appearances could not afford the expense of travel back and forth to his home.

Mr. Hart was extensively cross-examined on what information he expected to receive from Mr. Atkinson. The use of the term information in the three recorded telephone conversations is nebulous and ambiguous and not in the content usually attributed

to the word. If, as Mr. Hart contended, that he wanted a direct face-to-face confrontation with Mr. Atkinson so that Mr. Atkinson could not find any excuse at time of his sentence to negate his willingness to cooperate and furnish information, the several telephone conversations made by Mr. Hart to him would certainly serve that purpose. However, if the information sought by Mr. Hart was in some tangible form then it would appear more logical that a personal meeting take place so that this information could be passed from one to the other.

The identification of this information then becomes a primary issue. If Mr. Atkinson had no verbal information then simply not responding in a positive manner and staying away would suffice. However, in the recorded telephone conversation of December 19th, the information referred to takes on a tangible form when Atkinson stated to Hart that he would tell his wife to take this information to him, or put it in a package or something like that; and further on in the same conversation Hart told Atkinson to deduct the plane fare out of it or write it off on his income tax. For something to be packaged, it must be tangible; to deduct plane fare out of it, it must have some value and be negotiable; and to be written off on income tax, it must constitute an expense item.

It is noted in the recorded telephone conversation of December 26, 1969, Mr. Atkinson, in response to some of Mr. Hart's statements replied, as follows: "I gotta go pick it up . . . I got to get it where I got it . . . that won't put you where my stash is will it." Here again, whatever the information was that Mr. Hart was requesting from Mr. Atkinson was referred to by Mr. Atkinson as being in a tangible form. Also the several events that occurred in Goldsboro, North Carolina on December 26th, evolved about picking up the information. Again, the several references were to the information being in a tangible form.

It is further difficult to understand why Mr. Hart would spend his own money for the long distance telephone calls, three trips

from his home in Springfield, Illinois to and from the St. Louis Airport, and air fare to and from Goldsboro, North Carolina to personally contact Mr. Atkinson on a matter which was no longer in furtherance of his official duties and responsibilities. The alleged reasons that he gave could very well have been taken care of by other agents from within the Bureau of Narcotics.

In the overall situation, Hart would not personally contact Atkinson without Patch being present and Patch in turn would not resort to any form of affirmative action without Hart being present. Their joint activities constituted a form of concerted action. In other words "one would not move without the other." If this had been a matter in furtherance of official business, Hart would not need Patch, and Patch being a former employee of the Bureau could not conduct official business on behalf of the Bureau or legitimately have an interest in the same.

It is concluded that Messrs. Hart and Patch were conspiring to obtain something of value from Leslie Atkinson, which was for a purpose other than the conduct of official business and not in furtherance of the interest of the government. Although there is a serious question of the credibility of some of the witnesses involved, it is found that by a preponderance of the creditable evidence that Messrs. Hart and Patch were actively involved in a conspiracy to solicit and accept a bribe from Leslie Atkinson as charged in the proposal letter of December 30, 1969. It is further found that the action of the agency was not unreasonable, arbitrary or capricious under the circumstances, was of sufficient serious import to warrant initiation and effectuation of the removal action and was accomplished to promote the efficiency of the Service.

Decision

It is decided that the Internal Revenue Service of the Treasury Department make no change in its personnel action removing Mr. Hart from the Service effective February 5, 1970.

Notification of Further Appeal Rights

Unless this decision is further appealed within fifteen (15) calendar days of the day it is received, it becomes the final decision of the Civil Service Commission. Two copies of any further appeal should be addressed to the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. 20415. Since a further appeal does not include the right to a hearing before the Board of Appeals and Review any representation which the Board should consider beyond those now in the appeal file must be submitted in writing and in duplicate. Please notify this office of the filing of any further appeal so that the appeal file can be sent promptly to the Board.

Attached is CSC Form 942 providing more detailed information about further appeal to the Commission's Board of Appeals and Review.

/s/ J. A. Connor
J. A. Connor, Director, Chicago Region
U. S. Civil Service Commission

ADDENDUM IV

U. S. Treasury Department
Regional Commissioner
Internal Revenue Service
Midwest Region

Date: Feb. 2, 1970

In reply refer to:
Mr. Dennis J. Hart
116 South State Street
Springfield, Illinois 62704

Dear Mr. Hart:

In my letter to you on December 30, 1969, it was proposed to remove you or otherwise discipline you on the charge contained therein.

You did not answer the charge either personally or in writing. After careful consideration of the charge stated in my letter of December 30, 1969, my decision is as follows:

CHARGE I: Conspiring to solicit and accept a bribe.—SUSTAINED

Specification 1: On or about December 26, 1969 at Goldsboro, N. C. you conspired to solicit and accept a bribe, as a government employee, from Leslie Atkinson to aid him in a pending narcotics case in the Eastern District of New York. You conspired with Richard M. Patch, a former government employee, in the solicitation and acceptance of the bribe.—SUSTAINED

Charge I and Specification 1 are sustained and the proposed action is warranted. It is my decision to remove you from the Internal Revenue Service effective February 5, 1970.

You have the right to appeal this action to the Director, Personnel Division, Internal Revenue Service, 1111 Constitution Avenue, Washington, D. C. 20224, under Section 19(14)0, Part I, Internal Revenue Manual and to the Regional Director, Chicago Region, U. S. Civil Service Commission, Main Post Office Building, Chicago, Illinois 60607.

If you appeal first to the Civil Service Commission, you will have no right to appeal to the Director, Personnel Division. In order for your appeal to be considered by the Civil Service Commission, it must (1) be in writing, (2) set forth your reasons for contesting this action with such offer of proof and pertinent documents as you are able to submit and (3) be submitted no later than fifteen (15) calendar days after the effective date of this action.

If you appeal first to the Director, Personnel Division, you will not be entitled to appeal to the Civil Service Commission until after the Director, Personnel Division, has made a decision on your case. If, however, no decision has been made within sixty (60) days after you have filed your appeal, you may elect to cancel your appeal to the Director, Personnel Division, by appealing to the Civil Service Commission.

An appeal to the Director, Personnel Division, must (1) be in writing, (2) set forth clearly the basis for the appeal, (3) state the corrective action sought, (4) give the name of your representative if you have designated one, (5) include a request for a hearing if one is desired, and (6) be submitted no later than fifteen (15) days after the effective date of this action.

Additional information regarding the appeals procedure is available from Mr. Alvin E. Ray, Chief, Regional Office Personnel Section, telephone 312-353-3887, upon request.

A Standard Form 50 effecting your removal is enclosed.

Very truly yours,

/s/ W. A. COLLAWN
Assistant Regional Commissioner
(Alcohol, Tobacco & Firearms)

Enclosure

ADDENDUM IV

January 7, 1970

Mr. Dennis J. Hart
116 South State Street
Springfield, Illinois

Dear Mr. Hart:

Reference is made to my letter of December 30, 1969, proposing to suspend you for a period of not more than 30 days based on the charge and specification stated therein.

You did not submit a written reply by 12:00 noon, Tuesday, January 6, 1970. My decision is that the charge is sustained. Your continued presence on the job would be detrimental to the interest of the Government. It is my decision that you be suspended from duty and pay for a period of 30 days, commencing January 7, 1970 and extending through February 5, 1970.

If you wish, you may discuss this disciplinary action with me personally by calling 312-353-3778 for an appointment. If you avail yourself to this right and are dissatisfied with the results of the discussion, you may request reconsideration of this adverse action from the Regional Commissioner, Midwest Region, Internal Revenue Service, 35 East Wacker Drive, Chicago, Illinois 60601. A request for reconsideration must be in writing and must be made no later than fifteen (15) calendar days after the effective date of your suspension which is January 7, 1970.

You may also appeal this decision to the Regional Director, Chicago Region, U. S. Civil Service Commission, Main Post Office Building, Chicago, Illinois 60607, under Chapter 752 of the

Civil Service Commission Regulations if you believe the procedures of that chapter have not been followed. In order for your appeal to be considered by the U. S. Civil Service Commission, it must (1) be in writing, (2) set forth the reasons why you think appropriate procedures were not followed and (3) be submitted no later than fifteen (15) calendar days after the effective date of the suspension.

You may submit an affidavit to the Civil Service Commission if you believe this adverse action was taken against you for political reasons not required by law, or resulted from discrimination because of sex, marital status, physical handicap, race, creed, color, or national origin. The Commission will determine the validity of the contention and take appropriate action where indicated.

If the Civil Service Commission accepts your appeal, the Internal Revenue Service will take no action to reconsider your case while the appeal is pending before the Commission.

Additional information regarding the appeals procedure is available from Mr. Alvin E. Ray, Chief, Regional Office Personnel Section, telephone 312-353-3720 upon request.

A Standard Form 50 effecting your suspension is enclosed.

Very truly yours,

/s/ C. J. SCHULZ
Acting Assistant Regional
Commissioner
(Alcohol, Tobacco &
Firearms)

Enclosure

ADDENDUM VI

Dec. 30, 1969

Mr. Dennis J. Hart
116 South State Street
Springfield, Illinois

Dear Mr. Hart:

This is a notice of proposed adverse action issued in accordance with Part 752 of the Civil Service Commission regulations. In order to promote the efficiency of the Service, it is proposed to remove you from the Service or otherwise discipline you at any time after thirty (30) calendar days from the date you receive this letter.

This proposed adverse action is based on the following charge:

Charge 1: Conspiring to solicit and accept a bribe.

> *Specification 1*: On or about December 26, 1969 at Goldsboro, N. C. you conspired to solicit and accept a bribe, as a government employee, from Leslie Atkinson to aid him in a pending narcotics case in the Eastern District of New York. You conspired with Richard M. Patch, a former government employee, in the solicitation and acceptance of the bribe.

You have the right to answer the above charge for the proposed adverse action both personally and in writing and to furnish affidavits and evidence in support of your answer. Your written

reply and request for a personal reply must be received by me or the Chief, Enforcement Branch within fifteen (15) calendar days after receipt of this letter. Any written reply or request for a personal reply should be addressed to me, W. A. Collawn, Assistant Regional Commissioner (Alcohol, Tobacco & Firearms), 35 East Wacker Drive, Room 1926, Chicago, Illinois 60601 or the Chief, Enforcement Branch at the same address. Request for a personal reply may be directed to me by telephone at 312-353-3778 or the Chief, Enforcement Branch, at 312-353-3780.

In view of the nature of the charge and specification, your continued presence on the job is considered detrimental to the interests of the government; based on the charge and specification, it is proposed to suspend you from pay and duty status for not more than thirty days prior to final decision on the above proposed adverse action. It is impossible to permit you to remain in active duty status because of the above charge and specification. You will have until 12:00 noon, Tuesday, January 6, 1970 to reply in writing to the proposed suspension and to submit affidavits in support of your reply. Pending a decision on the proposed suspension you will be placed in a non-duty but with pay status.

No final decisions will be made in these actions until your reply, or replies, have been received and considered or, if no written reply is received or oral reply is requested, until after the time period specified is passed. Any replies submitted by you will be given full consideration and you will be notified in writing of the final decision.

If you have any questions concerning the above, additional information is available from Mr. Alvin E. Ray, Chief, Regional

Office Personnel Section, Room 1770, 35 East Wacker Drive, Chicago, Illinois 60601, telephone 312-353-3887.

Very truly yours

(Signed) W. A. COLLAWN
Assistant Regional Commissioner
(Alcohol, Tobacco & Firearms)

Received ..... Time: .....

.....
DENNIS J. HART
Criminal Investigator

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-327

DENNIS HART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was removed from his position as a Criminal Investigator with the Internal Revenue Service on a charge of conspiring to solicit and accept a bribe (Pet. App. A-49 to A-51), and appealed to the Civil Service Commission. A hearing was held at which petitioner was represented by counsel; the tribunal received documentary and testimonial evidence. Included in the evidence was the transcript of criminal proceedings at which petitioner appeared as a defendant to an indictment charging him with conspiring to accept a bribe.

The Civil Service Commission sustained the removal, and petitioner filed a petition in the Court of Claims seeking reinstatement and the recovery of lost wages on the grounds that his removal was procedurally defec-

tive and denied him due process of law (Pet. App. A-1). The Court of Claims granted summary judgment to the United States because "the procedures were proper" and the removal decision "was neither arbitrary nor capricious and is supported by substantial evidence" (*ibid.*).

1. Petitioner contends that because "[t]he allegations contained in the criminal indictment were not identical to the charge in the notice of proposed adverse action, * * * [p]etitioner's opportunity to defend was impaired" (Pet. 8), and that, therefore, the Civil Service Commission should not have received the transcript into evidence. However, the criminal trial transcript contained evidence relevant to the charge upon which petitioner's removal was based and petitioner, through counsel, had an opportunity to cross-examine the witnesses against him at the criminal trial.[1] Evidence of this nature is properly and routinely considered by the Civil Service Commission in removal cases.[2] *Polcover* v. *Secretary of the Treasury*, 477 F. 2d 1223, 1231-1232 (C.A. D.C.); *Finfer* v. *Caplin*, 344 F. 2d 38 (C.A. 2), certiorari denied, 382 U.S. 883; *Cohen* v. *United States*, 369 F. 2d 976 (Ct. Cl.), certiorari denied, 387 U.S. 917. Moreover, although, according to petitioner, the most damaging part of the transcript was the testimony of Leslie Atkinson (Pet. 12), the Court of Claims concluded that the Civil Service Commission's decision was "based on substantial evidence of plaintiff's conduct aside from Atkinson's testimony" (Pet. App. A-3).

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[1]Petitioner's contention that the Government failed to provide him with a "copy" of the transcript (Pet. 3, 12) is misleading. As the record below shows (Def. Exh. 1, p. 2), the transcript was forwarded from Civil Service Commission headquarters to the office of the hearing examiner in St. Louis, at the request of petitioner's counsel, for the express purpose of permitting petitioner's counsel, whose office is in St. Louis, to have access to it. Petitioner did not ask for a "copy" of the transcript either before or during the hearing.

[2]In Civil Service Commission proceedings "[r]ules of evidence are not applied strictly." 5 C.F.R. 772.305(c)(4).

2. Petitioner argues that the charge against him was "vague" and "impossible of rebuttal, reply denial or mitigation" because it did not allege "any specific *overt act* perpetrated in furtherance of an alleged conspiracy" (Pet. 8). This contention is inaccurate. Under 5 C.F.R. 752.302(a) petitioner was entitled "to an advance written notice stating the reasons, specifically and in detail, for the proposed action." The notice he received from the Internal Revenue Service contained the following charge (Pet. App. A-54):

> *Charge 1*: Conspiring to solicit and accept a bribe.
>
> *Specification 1*: On or about December 26, 1969 at Goldsboro, N.C. you conspired to solicit and accept a bribe, as a government employee, from Leslie Atkinson to aid him in a pending narcotics case in the Eastern District of New York. You conspired with Richard M. Patch, a former government employee, in the solicitation and acceptance of the bribe.

This charge is clear and specific, and it gave petitioner sufficient notice of the grounds for his proposed removal. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134. The charge in this case would have been adequate even were it a criminal indictment.

3. Finally, petitioner claims that at the first level of his Civil Service Commission appeal the hearing examiner, in sustaining petitioner's removal, improperly relied upon a certain exhibit which at the hearing he had ruled inadmissible (Pet. 9-10). However, as both the Court of Claims and the Board of Appeals and Review of the Civil Service Commission pointed out (Pet. App. A-2, A-7), the exhibit in question reflected the report of Inspector Thompson, who also testified under oath at the Commission hearing "substantially recounting the facts of the exhibit" (Pet. App. A-2). The error, if any, was

therefore harmless, particularly in light of petitioner's failure to challenge the conclusion of the Court of Claims that his removal is supported by substantial evidence.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11